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STATE STATUTES SERIES

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Standby Guardianship

Every State permits transfer of guardianship authority over a child from a parent to another adult. A traditional guardianship is used to provide for the care of a child in the event of the parent's death or permanent disability and is generally regarded as a permanent transfer of custody and authority from the parent to the guardian.

One of the more recent approaches to transferring custody is facilitated through standby guardian laws. Many States developed these laws to address specifically the needs of families living with HIV or other disabling conditions and terminal illnesses who desire to plan a legally secure future for their children. Approximately 21 States and the District

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U.S. Department of Health and Human Services
Administration for Children and Families
Administration on Children, Youth and Families
Children's Bureau

Child Welfare Information Gateway
Children's Bureau/ACYF
1250 Maryland Avenue, SW
Eighth Floor
Washington, DC 20024
703.385.7565 or 800.394.3366
Email: info@childwelfare.gov
www.childwelfare.gov

of Columbia have made statutory provisions for standby guardianships.[1]

Most standby guardian laws share these provisions:

- A parent may designate a certain person to be guardian for his or her children.
- The guardianship may go into effect during the parent's lifetime and may continue in effect after the parent's death.
- The parent retains much control over the guardianship. He or she may determine when it can begin (although it may commence automatically if the parent becomes seriously ill or mentally incapacitated) and can withdraw the authority if the arrangement does not work to the parent's satisfaction.
- The parent shares decision-making responsibility with the guardian. During the parent's lifetime, the guardian is expected to be in the background, embrace responsibility when needed, and step back when the parent is feeling well.
- The court order for standby guardianship is supported by the authority of a court that has examined facts relevant to the particular family.

Establishing a Standby Guardian

Many States allow a parent or legal guardian to nominate a standby guardian regardless of the nominator's health status. However, some States preclude such nomination unless the parent is at significant risk of death or incapacity within a specified time period. Indeed, some States require a documented health status by an attending physician to initiate the court process.

Standby guardianship is typically established one of two ways: (1) by filing a petition, followed by a court hearing, prior to the event that necessitates standby guardianship (called the "triggering event," see next section) or (2) through a written designation, with a petition prior to or after the triggering event and a hearing following the event. Many States also provide that a

[1] The word *approximately* is used to stress the fact that the States frequently amend their laws. The States that currently (as of May 2005) have provisions for standby guardianship include Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin.

child of a certain age must be notified and that the court must consider the child's preferences. The age requirement varies by State.

Activating the Standby Guardian's Authority

A "triggering event" must occur to activate the standby guardian's authority. Typically, States define this event as death, mental incapacity, or physical debilitation, plus parental consent. As mentioned, many States also mandate that an attending physician document such incapacity or debilitation.

Typically, upon a triggering event, the standby guardian has a statutorily prescribed amount of time in which to file confirming documents and/or a petition for approval. Standby guardians must also generally petition for permanent guardianship or initiate custody proceedings within a specified time period.

State statutes vary significantly with respect to activation of the standby guardian's authority, and they should be consulted and read carefully.

The Noncustodial Parent

States vary significantly with respect to involvement of the noncustodial parent. Some States require that both parents, if living, consent to standby guardianship. Other States simply require that reasonable efforts be made to locate and serve notice to the noncustodial parent with parental rights. Thereafter, a petition may be filed without consent to the designation.

Authority of the Parent vs. the Standby Guardian

The relationship between the authority of the parent and that of the standby guardian varies considerably among States.

Most States provide that once standby guardianship is activated, the standby guardian and parent, while living, have concurrent authority, and that the commencement of a guardianship does not in any way limit or supersede the parent's parental rights. However, a few States provide that once the guardianship is activated, the standby guardian assumes sole authority. Still other States provide that a standby guardian's authority becomes inactive upon an attending physician's written certification that the parent is restored to health.

Withdrawing Guardianship

States vary on laws regarding withdrawal of standby guardianship, and a few States that provide for standby guardianship are silent on the issue of withdrawing it. In most States, when an appointment has been made by written designation, the parent may revoke the designation by informing the standby guardian in writing. In addition, the standby guardian may refuse an appointment by notifying the parent in writing.

After an appointment has been approved by the court, States generally provide that a written revocation must be filed with the court and that the standby guardian be notified in writing.

This publication is a product of the State Statutes Series prepared by Child Welfare Information Gateway. While every attempt has been made to be as complete as possible, additional information on these topics may be in other sections of a State's code, as well as agency regulations, case law, and informal practices and procedures.